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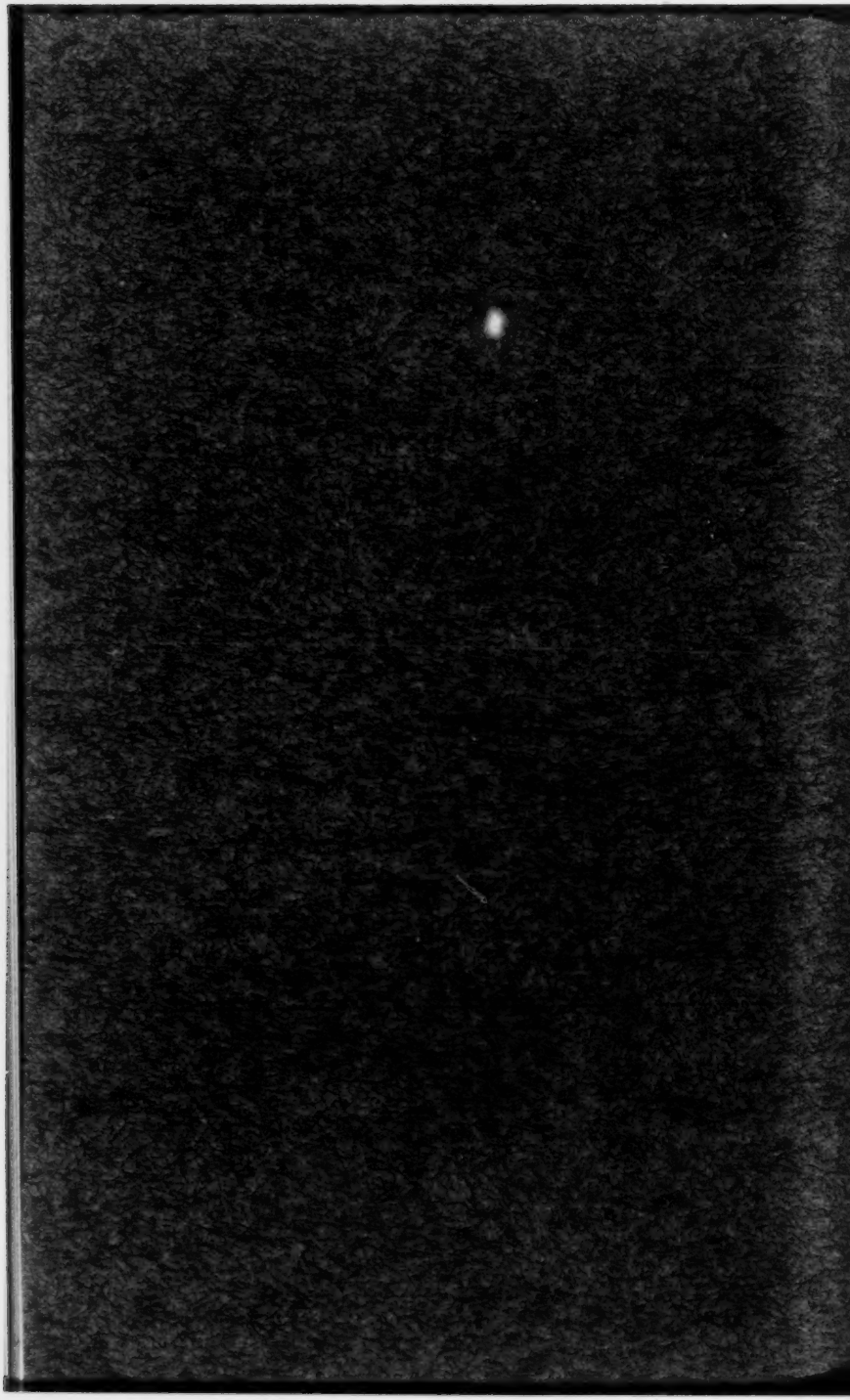

# INDEX



## CITATIONS





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# In the Supreme Court of the United States

OCTOBER TERM, 1944

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Nos. 669, 670, 671, 682, and 683

JOSEPH COHEN, MANDEL RAFFE, N. E. ROGOFF, JOEL ROSENBERG AND BERTRAM WACHTEL, PETITIONERS

*v.*

UNITED STATES OF AMERICA

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*ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT*

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## BRIEF FOR THE UNITED STATES IN OPPOSITION

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### OPINIONS BELOW

The opinion of the United States Circuit Court of Appeals for the Second Circuit is reported at 145 F. (2d) 82.

### JURISDICTION

The judgment of the circuit court of appeals was entered October 18, 1944. The petitions were filed on or before November 15, 1944. The jurisdiction of this Court is invoked under Section

240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rules XI and XIII of the Criminal Appeals Rules promulgated by this Court May 7, 1934.

QUESTIONS PRESENTED

The principal questions presented are:

1. Whether petitioners were improperly subjected to a lengthy trial of numerous schemes to defraud rather than of one scheme or conspiracy as charged in the indictment.

2. Whether the trial judge committed reversible error in failing to withdraw from the jury's consideration those 5 of 29 overt acts set forth in the conspiracy count which were alleged to have occurred more than three years prior to the returning of the indictment.

3. In addition the following questions are raised by one or more of the petitioners:

a. Whether the circuit court of appeals applied a proper standard for appellate review of the sufficiency of the evidence.

b. Whether the evidence is sufficient to establish petitioner Raffe's participation in a conspiracy within the jurisdiction of the district court during the period of limitations.

c. Whether the evidence is sufficient to establish the mailing within the jurisdiction of the district court of the letters on which counts 1 and 2 were based.

d. Whether the district judge failed to curb the Government's accomplice witness Mussman sufficiently.

e. Whether the reading of a reported opinion, on cross-examination, showing that the reversal of petitioner Rosenberg's prior conviction for mail fraud was based not on the absence of a scheme to defraud but on the lack of proof of mailing prejudiced the other defendants.

f. Whether it was prejudicial misconduct for the prosecutor to question petitioner Cohen concerning his knowledge that persons employed by him had previously been convicted of crimes involving deceit.

g. Whether petitioners were deprived of their constitutional rights by reason of the fact that the judge privately examined statements made by a government witness to government officers in order to ascertain whether such statements should be made available to defendants.

h. Whether the trial court abused its discretion by denying petitioner Rosenberg's motion to examine the transcript of the testimony before the grand jury of a witness who had died before the trial.

## STATUTES INVOLVED

Section 37 of the Criminal Code, the general conspiracy statute (18 U. S. C. 88), provides:

> If two or more persons conspire either to commit any offense against the United

> States, or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be fined not more than $10,000, or imprisoned not more than two years, or both.

Section 215 of the Criminal Code, the mail fraud statute (18 U. S. C. 338), provides in pertinent part:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, * * * shall, for the purpose of executing such scheme or artifice or attempting so to do, place, or cause to be placed, any letter, postal card, package, writing, circular, pamphlet, or advertisement, whether addressed to any person residing within or outside the United States, in any post office, or station thereof, or street or other letter box of the United States, or authorized depository for mail matter, to be sent or delivered by the post-office establishment of the United States, or shall take or receive any such therefrom, whether mailed within or without the United States, or shall knowingly cause to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such letter, postal card, pack-

age, writing, circular, pamphlet, or advertisement, shall be fined not more than $1,000, or imprisoned not more than five years, or both.

STATEMENT

An indictment in 30 counts charging use of the mails in execution of a scheme to defraud and conspiracy so to use the mails was returned against 75 defendants in the District Court for the Southern District of New York.[1] The scheme charged was, in essence, one to defraud named victims and persons to the grand jury unknown by means of various fraudulent representations designed to induce them to purchase interests of various kinds in lands represented as oil bearing, or shares of stock in various oil and other companies. Twenty-eight defendants pleaded guilty prior to trial, the case was severed as to 19, and the indictment was dismissed as to one prior to trial. Thirteen defendants pleaded guilty and the indictment was dismissed as to one during

[1] The indictment appears at pp. 2–68 of the record filed on behalf of petitioner Rogoff. All record references in this brief, unless otherwise noted, refer to the complete transcript of the stenographer's minutes of the trial filed in the circuit court of appeals by the United States Attorney with permission of that court. All petitioners have proceeded on typewritten records of varying lengths representing abridgements of the original transcript, none of which have been served upon the Government. We are lodging with the Clerk of this Court the transcript filed by the United States Attorney in the circuit court of appeals.

trial. Of the remaining 13 two were acquitted and 11 convicted by the jury on various counts. The 5 petitioners were convicted and sentenced as follows:

Bertram Wachtel: Convicted on Counts 1, 5, 6, 7, 18, 20, 22, 23, 25, and 30. Sentenced to 5 years on Count 1; 2 years on Count 30, the conspiracy count, to run consecutively; and fined $5,000. Sentence suspended on Counts 5, 6, 7, 18, 20, 22, 23, 25 and defendant placed on three years' probation (R. 15763).

Joseph Cohen: Convicted on Counts 1, 4, 22, 23, 27, and 30. Sentenced to 5 years on Count 1; 2 years on Count 30, to run consecutively; and fined $5,000. Sentence suspended on Counts 4, 22, 23, 27 and defendant placed on three years' probation (R. 15762, 15789, 15790).

Joel Rosenberg: Convicted on Counts 7, 19 and 30. Sentenced to 5 years and $2,000 fine on Count 7. Sentence suspended on Counts 19 and 30 and defendant placed on three years' probation (R. 15741).

Mandel Raffe: Convicted on Counts 2 and 30. Sentenced to 5 years and $2,500 fine on Count 2. Sentence suspended on Count 30 and defendant placed on three years' probation (R. 15763, 15798).

N. E. Rogoff: Convicted on Count 30. Sentenced to 18 month and $500 fine (R. 15740).

The Circuit Court of Appeals for the Second Circuit affirmed the judgments except that it re-

versed the convictions of petitioner Rosenberg on the two substantive counts, leaving merely his conviction on the conspiracy count, on which he was placed on probation, and reduced the fine imposed on petitioner Raffe.

The evidence of the Government, with particular reference to the present petitioners, may be summarized as follows:

In 1929 and 1930 petitioner Raffe operated a securities brokerage business in Boston under the name of Mandel Raffe & Company (R. 6176). He sponsored the sale of various types of stock (R. 6181, 6187, 6206, 6217–6219, 6229), including stock in an investment trust known as Surety Investments Inc. (R. 131, 6176–6177, 6229, 9340), a royalty investment company known as Producers Royalty Corporation (R. 6176, 9340–9341), and Midcontinent Diversified Syndicate (R. 6178, 9341). A number of defendants named in the indictment were salesmen who worked for Raffe & Company (R. 6219–6221, 6226–6228). An enterprise known as National Publishers Service, which had originally been started by defendant Levine with Raffe's aid as a method of soliciting newspaper space (R. 6172), was, in 1933, utilized as an investment counsel service, in order to obtain names of prospective investors (R. 6129–6130). In the latter part of 1931 Raffe sent Fogelson, who had been working for him as a salesman (R. 9340), to Texas to buy wild cat land as cheaply as possible. Raffe intended to use

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such land in replacing royalties previously sold by him which had decreased in value (R. 9348–9351, 9368–9370). Fogelson bought land in Brewster County, Texas, in his own name (R. 9370–9373, 9376) and Raffe either sent or reimbursed him for the money expended in the purchase of the land (R. 9383, 9386). A large block of the land so purchased was transferred at Raffe's request to the Great Texas Oil Co., a registered trade name of Raffe (R. 9397–9398, 6206). In the latter part of 1933 the Texas Oil Company was transferred to Fogelson's name (R. 6232, 9479–9480, 9484). Raffe turned the land over to Fogelson with the understanding that he was to receive $5 an acre plus 50 percent of the profits received from the sale of the land (R. 9481) and Raffe sent to Fogelson various persons to whom the land was to be sold (R. 9492–9494, 9500–9511). Among the persons to whom the land was thus sold by Fogelson were defendant Joel Pike (R. 9495–9499) and defendant Mussman (R. 9505–9506, 9514–9515).

In 1934, at the instigation of Raffe, Pike and Ames started a royalty business under the name of Income Royalties (R. 4902–4911). In June of that year one Gaines was introduced to Pike by Raffe as an influential person with money who was interested in the business (R. 4911–4913). Gaines and Raffe agreed to transfer stocks and money to Pike's name in order to

enable him to obtain a broker's license (R. 4914–4915, 4963–4964). Pike obtained the license under the name of Joel Pike & Company (R. 4917) and rented an office in the same building where Raffe maintained his office (R. 4914). The arrangement was that Pike was to receive a salary and that profits were to be divided between Raffe, Gaines and Pike (R. 4916). Salesmen who had been registered as salesmen for Raffe & Company were reregistered under the name of Joel Pike & Company (R. 4919, 6231, 6233) and, at Raffe's suggestion, that company obtained larger quarters in order to have a room in which the salesmen could meet (R. 4924–4925). When salesmen requested Texas land from Pike, Raffe arranged to have Brewster County land transferred to Joel Pike & Company (R. 4925–4926, 4999, 5006). Raffe gave Pike letters received by the National Publishers Service and told him that the persons who sent the letters represented good leads (R. 4957, 4961). Pike gave these leads to various salesmen in the office (R. 4961). Late in 1935 Pike lost his broker's license (R. 4996) and he then worked as salesman trying to sell land and other securities, in part to persons whose names were given to him by Raffe (R. 5041–5042).

From about September 1933 one Samuel Mussman worked as a salesman for Raffe (R. 136). Mussman sold to various customers whose names

he obtained from Raffe (R. 169, 304, 320, 361, 377, 530, 543, 564, 571, 606, 625, 647–648) securities sponsored by Raffe (R. 128–130, 139–140, 378–379, 532) and western lands which he bought from Raffe, Joel Pike & Company and Fogelson (R. 169, 346, 364, 372–374, 548, 567, 572). In addition to paying for the land, Mussman and the salesmen with whom he worked divided with Raffe the profits received from these transactions (R. 169, 176, 308, 310–312, 340–341, 364, 537, 572, 620). Raffe and Mussman together devised methods of appealing to customers in order to effectuate sales (R. 187–188). Mussman had an office for the transaction of business the rent of which was paid by Raffe (R. 307, 315–316, 511).

In 1932 Fogelson for a time worked for Percy Winter & Co. in New York, where he met petitioners Cohen and Wachtel (R. 9401–9404). In the latter part of 1934, after Fogelson had returned to Boston (R. 9403–9408), he had a conversation with petitioners Cohen and Wachtel in New York (R. 9571–9572). Cohen and Wachtel were then operating a royalty trust known as Underwriters Group (R. 9608). Wachtel gave Fogelson a list of names of New England residents (R. 9582, 10380–10382), who had previously been visited by other salesmen of the Underwriters Group (R. 9588, 9590–9592). Fogelson and the Underwriters Group had considerable correspondence relating to the various names thus

furnished to Fogelson (R. 9598–9606). In the latter part of 1935 Fogelson turned over to Mussman some of the names which he had originally received from Wachtel (R. 9671, 9673). One such name was that of Dr. Post from whom Mussman succeeded in obtaining in exchange for land a royalty which he resold to Fogelson (R. 824, 9679). The transactions with Post form the basis of count 25. Proceeds received were divided among Fogelson, Wachtel, Mussman and Goldie (R. 337, 829–833, 1874, 2132, 3216).

Wachtel, through Gaines, was also supplying names to Joel Pike & Co. in Boston (R. 4971). On a visit to Boston he was introduced to Pike who gave him a check in payment of names previously supplied (Gov. Ex. 840, R. 4971).

Late in 1934 Gaines introduced Mussman to Wachtel (R. 380–381) and subsequently Wachtel told Mussman that he would like to have him meet his partner Joseph Cohen (R. 383). Early in 1935 Wachtel did introduce Mussman to Cohen at the office of the Underwriters Group (R. 384–385). Thereafter Wachtel gave Mussman a number of names, some of which resulted in the transactions involving the sale of Texas "oil" land by Mussman which formed the bases of certain of the count letters, e. g., count 1 discussed *infra*, pp. 16–17; Cleveland, count 5 (R. 886–887); Fennikoh, count 7 (R. 1049, 1932); Murray, count 18 (R. 925–928); Pettit, count 20 (R. 1103, 3286). In

the course of these transactions lulling letters devised by Wachtel, Cohen and Mussman were sent to customers on stationery bearing such names as Midwest Co. and Midcontinent Associates (R. 991).

In 1933 or 1934 the defendant Marion met Wachtel in New York (R. 7154). Wachtel told Marion that there was a new "racket" selling oil royalties and that he would arrange to have Marion connected with an office and would supply him with names to "qualify," i. e., prepare for sales (R. 7154–7156). Subsequently Marion was told not to go to the office because it was being investigated by the Attorney General of New York (R. 7158). Marion then got in touch with Wachtel, who introduced him to Cohen. Wachtel told Marion that he and Cohen were organizing an oil royalty trust which could be used as a front not only to sell securities but for the purpose of obtaining names (R. 7159, 7172–7174). Wachtel gave Marion the name of Martha Whitaker (R. 7175). Marion called on Miss Whitaker but did not succeed in selling her anything (R. 7176). He turned over the name to Mussman and drove Mussman to Miss Whitaker's house in Elizabeth, New Jersey (R. 7176, 656–657). Mussman obtained a royalty from Miss Whitaker (R. 660) and, at Wachtel's request, sold it to one Carl Phillips (R. 657, 661). The land sold to Miss Whitaker in exchange for the royalty was obtained from Joel Pike & Co. (R. 664–666).

Marion told Wachtel that he wanted "spots," that is, special names, and Wachtel replied that he would have to consult Cohen on the division of profits (R. 7187). Wachtel, Cohen and Marion had a conference in which a division of profits was arranged (R. 7189). Wachtel and Cohen then gave Marion the name of Mrs. McChesney (R. 7190) and told him that she had a very good royalty which they would like to get back into the office (R. 7192). Marion asked Rogoff to work with him on this deal (R. 7196). Rogoff visited Mrs. McChesney in December 1935 and reported to Marion that she was a "cinch" if prepared (R. 7198). Marion then called upon Mrs. McChesney and represented himself as a geologist (R. 7198). Rogoff succeeded in getting Mrs. McChesney to exchange her land for a block of land in Webb County, Texas (R. 7200). Rogoff gave the royalty to Marion to dispose of in accordance with the original understanding and Marion brought it to the office of the Underwriters Group (R. 7201). Marion's return of approximately $1,000 was divided between him and Rogoff (R. 7206, 7208). Marion also received the name of Dr. Washington from Wachtel and Rogoff sold Dr. Washington land in Webb County. Marion gave Wachtel $100 for the use of the name (R. 7209). Marion received from Wachtel the names of other persons (R. 7210, 7213) to whom Rogoff sold Texas land (R. 7211–7212, 7214), deeds to which had to be mailed for recording (R. 7221, 7804–7805). Profits on these transactions were divided between Rogoff

and Marion (R. 7213, 7215, 7217–7218) and Marion paid Wachtel for the use of the name (R. 7213, 7215). Although Rogoff did not know the source of the McChesney name (R. 7196, 7451), he did later know that Wachtel was supplying names to Marion (R. 7229, 7513, 7518).

One of the names given to Mussman by Raffe was that of James J. McDonald (R. 290). Mussman called on Mr. McDonald and his aunt, Ellen McDonald, and succeeded in selling to Miss McDonald potential oil lands, royalties and so-called rights (R. 291–303). In 1936 the defendant Richard Coshnear introduced Mussman to Joel Rosenberg (R. 997–998, 1344). Rosenberg told Mussman that he was selling Mexican oil leases and that he would like to have Mussman work with him (R. 997a, 1346). One of the names which he mentioned was that of the McDonalds (R. 999). Mussman, Goldie and Rosenberg agreed that they ought to work together in further deals with the McDonalds (R. 1352, 1373, 8209). Rosenberg represented himself as a Mr. Price from New Mexico, Goldie as an oil magnate, and Mussman as an investment counselor (R. 1372–1373; see R. 4440, 4465, 8206). Coshnear also visited the McDonalds as a Mr. Johnson of the Phillips Petroleum Company to tell them that Mr. Mason (Mussman) who was supposed to be ill would recover soon (R. 4471–4472; see R. 1365). Profits on these later transactions with the McDonalds were divided among Rosenberg, Cosh-

near, Goldie and Mussman (R. 1377, 3580, 8210–8211).

Rosenberg and Mussman also took a trip to Chicago in order to try to make sales to Mrs. Wyatt, to whom Rosenberg had previously sold oil leases (R. 1001; see R. 5602). Mussman and Rosenberg together obtained about $6,000 from Mrs. Wyatt, and after paying about $100 for the leases divided the profits between themselves (R. 1001–1005; see R. 5608–5609). Mussman also sold Mrs. Wyatt some Brewster County land, deeds to which were mailed from New York City (R. 1005, 1023, 1024, 5610, 5618, 5640–5641).

Rosenberg also discussed with Mussman the name of Dr. Wright (R. 1466–1467). Mussman told Dr. Wright that he was not receiving any returns on his original investment because he had failed to take up his potential rights (R. 1471). The money received from Dr. Wright was divided between Rosenberg and Mussman (R. 1474, 1477, 1481, 1492). When Wachtel heard about this activity he claimed that the name belonged to the Underwriters Group (R. 1494–1495) and it was agreed that Wachtel, Rosenberg and Mussman would divide profits (R. 1497). Subsequently, Mussman divided profits with Wachtel without making provision for Rosenberg (R. 1500) but, when Rosenberg complained, the others agreed to give him a percentage (R. 1527, 1533, 1614).

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The means by which victims were defrauded are illustrated by the particular transactions which form the basis of the count letters. For the sake of brevity we discuss only the transactions covered by count 1 on which petitioners Cohen and Wachtel received prison sentences, and count 2 on which petitioner Raffe received a prison sentence.[2]

*Anderson transaction* (*Count 1*).—Early in 1935 Wachtel gave Mussman the name of Amanda K. Anderson, which Wachtel had obtained from Fogelson (R. 402–405). Wachtel told Mussman that Cohen wished to obtain for the Underwriters Group certain royalties owned by Miss Anderson. Wachtel advised Mussman to make false representations to Miss Anderson about "rights, capping and overflow" (R. 481–485). Mussman and Goldie called on Miss Anderson and gave her the sales talk as prepared, telling her that if she made the exchange they advised she would eventually have royalties bringing greater returns than those she then owned (R. 488–489). Mussman and Goldie obtained from Miss Anderson two royalties and $900 in cash in return for "potential oil land" represented as owned by Midcontinent Associates (R. 490–491). Cohen wanted both royalties but Wachtel said that he had already promised one of them to Fogelson,

[2] Rogoff was convicted only on the conspiracy count and Rosenberg's conviction was sustained only as to the conspiracy count.

with the result that one royalty was turned over to Cohen and one to Fogelson (R. 490–491, 3126, 10,836). Some of the land transferred to Miss Anderson was obtained from Fogelson (R. 492). The proceeds of the deal were shared among Wachtel, Cohen, Fogelson, Goldie and Mussman (R. 491, 3126, 10774). Thereafter Goldie and Mussman made other sales to Miss Anderson but she received no income (R. 490, 492). She frequently phoned "Midcontinent Associates," a fictitious company which occupied desk space in a New York office but which had no assets (R. 637). To pacify her, Mussman, Goldie, and Wachtel mailed her several letters purporting to come from "Midcontinent Associates" (R. 474, Gov. Ex. 52, R. 476). One of these letters (Gov. Ex. 52, R. 476) was prepared or approved by Wachtel and mailed from New York City (R. 476, 1785–1787). The mailing of this letter forms the basis of Count 1.

*Bacon transaction (Count 2).*—Among the various names given to Mussman by Raffe was that of Miss Bacon (R. 606). Mussman and defendant Louis Brown called upon Miss Bacon (R. 607) and told her that she was not getting income from royalties previously purchased because she had not taken up her rights and was not receiving the benefits of the capping and overflow (R. 607–608). Mussman visited Miss Bacon several times and obtained various sums of money

from her, some of which he divided with Raffe (R. 608–612, 614–615). In the latter part of February 1935, Raffe, Brown and Mussman visited Springfield, Massachusetts, where Miss Bacon lived. Mussman called on Miss Bacon telling her that she still owed a balance of $305. While Mussman was there Brown called Miss Bacon from the hotel and stated that unless she paid up the balance then due she would get no "overflow" (R. 618–620). When Mussman returned to the hotel Raffe and Brown told him that they had called Miss Bacon in order to find out if he was reporting the amount of his sales correctly, and also because they thought that by that means they could induce her to pay more money. The money received as a result of Mussman's visit was divided between Mussman, Raffe and Brown, but no deed covering the purchase was delivered to Miss Bacon (R. 620–621).

Raffe failed to make the deliveries of land which had been sold to Miss Bacon and, in order to avoid trouble, Mussman and Goldie obtained some Texas land and delivered it to Miss Bacon (R. 622–623). Raffe heard about this situation and spoke to Mussman about it (R. 627–628). In 1936 Miss Bacon continued to make complaints that she had received no income. Raffe, Goldie and Mussman met in Boston to decide what to do about the matter. Raffe stated that there was nothing to worry about because there was so little

money involved and because the matter was almost outlawed by the statute of limitations (R. 632). However, in order to satisfy Miss Bacon, Goldie and Mussman sent her a letter dated February 25, 1936, on the stationery of Midcontinent Associates. Goldie signed the letter in the name of L. J. Cronin and the letter was mailed from Manhattan (R. 633, Gov. Ex. 84, R. 8136). A few weeks later, in the spring of 1936, Goldie and Mussman met Raffe and told him about the letter that they had sent to Miss Bacon (R. 637). Goldie also reported that he had visited Miss Bacon and pacified her (R. 639–641).

## ARGUMENT

1. All of the petitioners contend that there was a fatal variance between the indictment which charged one scheme and the proof which, they assert, established many separate schemes, with the result that petitioners were subjected to a lengthy trial in which their rights were materially prejudiced.[3] Petitioners place particular emphasis on that part of the opinion of the circuit court of appeals which states that, even if there were a variance, it would not be fatal (pp. 2252–2253)[4] and ignore the earlier part of the opinion in which

[3] Rosenberg, Pet. 11–19; Wachtel, Pet. 13–19; Cohen, Pet. 14, 27–36; Raffe, Pet. 6–7, 16–23, 26–34; Rogoff, Pet. 13–15.

[4] The page references to the opinion below are to the numbers as given in the reprint of the opinion as appendices to the petitions of Cohen and Raffe.

the circuit court of appeals found that "even in the strictest sense there was no variance; a single 'scheme' was alleged and a single 'scheme' was proved, though by hypothesis it did not include by any means all the transactions proved" (pp. 2250–2251). The scheme, the conspiracy, here proved was, it is true, a loose confederation rather than a closely integrated union. The evidence shows that there were, in general, two groups, one in Boston centering on Raffe and Fogelson, and another in New York centering on Cohen and Wachtel; and that, even within these groups, there were varieties of fraud. Thus, petitioner Rogoff was apparently engaged in selling oil lands on his own but used names supplied by Wachtel for which Wachtel was paid, and obtained in exchange for his own land oil royalties desired by Cohen and Fogelson which were resold to them. Petitioner Rosenberg also operated a scheme of his own but worked with others more directly tied to the conspiracy whenever it proved to his advantage (see Statement, *supra*, pp. 14–15).[5] There was, however, as the court below found, ample evidence that "the two groups worked with a general understanding and with mutual help" (p. 2250). The supplying of names by the New York group to the Boston group and occasionally by the Boston group to the New York one, the

[5] Rogoff and Rosenberg are adjudged guilty only of the conspiracy count (*supra*, pp. 6–7, 16).

supplying of land by the Boston group to the New York group, the interchange of personnel, the division of profits by various members of both groups (see Statement, *supra*, pp. 10–11, 12, 13, 16), all demonstrate that there was in fact a mutual agreement to work together in furtherance of the common end of fleecing the public. Under such circumstances it was entirely proper to charge all the petitioners as members of one conspiracy even though they were not all aware of the full scope of the conspiracy and did not all participate in it to the same degree. *United States* v. *Valenti*, 134 F. (2d) 362 (C. C. A. 2), certiorari denied, 319 U. S. 761; *United States* v. *New York Great A. and P. Tea Co.*, 137 F. (2d) 459, 463 (C. C. A. 5), certiorari denied, 320 U. S. 783; *Oliver* v. *United States*, 121 F. (2d) 245 (C. C. A. 10), certiorari denied, 314 U. S. 666; *Lefco* v. *United States*, 74 F. (2d) 66 (C. C. A. 3); *Wyatt* v. *United States*, 23 F. (2d) 791 (C. C. A. 3), certiorari denied, 277 U. S. 588; *Martin* v. *United States*, 100 F. (2d) 490, 495–496 (C. C. A. 10), certiorari denied, 306 U. S. 649.[8] These cases all

[8] These cases dispose of petitioner Rogoff's contention (Pet. 10–13) that he was improperly convicted because the evidence shows that he did not know the source of the names supplied by Marion. Aside from the fact that Marion testified that, subsequent to the McChesney transaction, petitioner Rogoff did know that the names were coming from Wachtel, it is clear that, in the McChesney transaction (*supra*, pp. 13–14) Rogoff knew that Marion wished to obtain the royalty for an undisclosed source and Rogoff agreed to aid the consum-

involved conspiracies with fluctuating membership in which many of the conspirators did not know the full scope of the conspiracy and did not know many of their co-conspirators, but in which there was nevertheless found to be a common thread and a common purpose binding all the defendants together in one conspiracy.

This was not, as petitioners apparently contend, a situation in which offenses known to have been committed by different persons were joined in one indictment for reasons of expediency. Here the defendants, to some extent operating their own frauds, were at the same time conducting frauds which interlocked with larger units and these larger units in turn interlocked with each other. To have charged and tried each separate transaction as a separate offense, or even to have separated the New York and Boston groups, would have been to endow the conspiracy with a simplicity that it did not possess. The interlocking relationships between the various defendants was not of the Government's making and the situation was one in which it was impossible to determine at the outset, if at all, where the united effort ended and the separate individual frauds began. The jury were instructed that if they found that "the business activities of any one of

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mation of that plan. Hence, he knowingly furthered the object of the conspiracy although he may not have been aware of the particular identity of some of his co-conspirators.

the defendants were wholly outside the State of New York and that he was not in any [way] associated directly or indirectly with others in New York State with the mailing of letters or any other overt act in the State of New York," then such defendant was not properly within the jurisdiction of the court and could not be convicted (R. 15670–15671).[7] The trial judge also called the jury's attention to defendants' contention that a general scheme was not proved as well as to the various factors which, if believed, would show that there was such a conspiracy (R. 15681–15684). The existence of a single conspiracy was thus an issue directly before the jury, and its verdict showing that it found that there was such a general conspiracy is, as we have shown, supported by the evidence. Cf. *Lefco* v. *United States,* 74 F. (2d) 66 (C. C. A. 3).

The trial in this case was undoubtedly long and complicated but the short answer to petitioners' contention that the jury must have been confused is that the verdict rendered demonstrates that the jury was not confused. The jury convicted all of the defendants on the conspiracy charge, but on the substantive counts convicted only those de-

[7] The trial judge did in this instruction say New York State rather than, as would have been technically correct, the Southern District of New York, but since the really important issue was whether the Boston activities were sufficiently related to the New York conspiracy to be punishable in that district, the error could not have been significant.

fendants who were directly involved in the particular transaction forming the basis of the count. The extreme care exercised by the jury in this respect is shown by the fact that, although several government witnesses spoke of Cohen and Wachtel as partners who shared in the proceeds from the sales to various persons whose names were supplied by Wachtel (e. g., R. 383, 7184), the jury convicted Cohen only on those counts on which his active participation was more directly shown. Considering the nature of the conspiracy here tried, the verdict does not, as petitioner Raffe claims (Pet. 17–18), show that the jury found that there were a number of separate conspiracies rather than one general scheme. The verdict shows that the jury understood the nature of the conspiracy as a loose concert of action and chose not to hold each defendant liable on substantive counts for all acts committed by the entities which together formed the conspiracy. Even in the case of more closely integrated conspiracies, it is not unusual for a jury to convict different defendants on separate substantive counts[8] but such fact does not serve to divide a general scheme into separate unrelated schemes. Both petitioners Rosenberg (Pet. 12) and Raffe (Pet. 29) point to the fact that the circuit court

[8] E. g., *Blue* v. *United States*, 138 F. (2d) 351 (C. C. A. 6), certiorari denied, 322 U. S. 736; *United States* v. *Beck*, 118 F. (2d) 178 (C. C. A. 7), certiorari denied, 313 U. S. 587.

of appeals reversed the convictions of petitioner Rosenberg on the substantive counts as proof of their contention that the jury was confused. It is to be noted, however, that as to count 7 there was testimony that the petitioner Rosenberg drove with Mussman to the place where the victim lived (R. 1052) in addition to the fact that Mussman testified that petitioner Rosenberg shared in the profits (R. 1061);[9] as to count 19, the McDonald transaction, petitioner Rosenberg was definitely implicated in its later aspects, the only question being whether the letter which formed the basis of the count was mailed before or after he joined forces with Mussman and Goldie (see *supra*, p. 14).

Petitioners strongly attack the statement in the opinion below that the possibility of confusion must be balanced against the necessity of bringing all offenders to trial (p. 2257), but they disregard the immediately preceding statement of the court that "We do not indeed mean that this would excuse the absence of the fundamentals of a fair trial, but these were present." In this case the jury was called upon to determine the guilt of only 13 persons, and of those now seeking review, three (Cohen, Wachtel and Raffe) were, as the court below found, so definitely implicated

[9] The circuit court of appeals thought that this was probably a slip of the tongue on Mussman's part since Edward Rosenberg, a defendant not on trial, rather than Joel Rosenberg, was more closely connected with the defrauding of this victim.

as leaders that there was no danger that the guilt of others would be attributed to them. The other two stand convicted only upon the conspiracy count, and the evidence indisputably links them to the conspiracy. A trial for mail fraud has none of the emotional hazards of a treason trial and the remarks of the Seventh Circuit in *United States* v. *Haupt,* 136 F. (2d) 661, as to the danger of a joint trial for treason do not, as petitioners Cohen (Pet. 28–32) and Raffe (Pet. 30–31) claim, represent a conflict with the decision below in respect of a joint trial for mail fraud.[10]

2. Petitioners Cohen (Pet. 36–40), Raffe (Pet. 34–35), Rosenberg (Pet. 19–23), and Wachtel (Pet. 19–23) all urge as a reason for the granting of certiorari the admitted conflict between the instant decision of the Second Circuit and the decisions of other circuits as to the necessity of proving an overt act within the statute of limitations. We do not believe that the conflict warrants the granting of certiorari in this case, for the issue involved—whether it was error not to withdraw from the jury's consideration 5 overt acts occurring beyond the period of limitations—

[10] Rosenberg's contention that the reversal by the circuit court of appeals of his conviction upon the substantive counts establishes that the scheme had ended before he joined the conspiracy (Pet. 23–24), is without merit. The plan to defraud the McDonalds continued and he actively aided therein after the mailing of the count letter (see Statement *supra*, pp. 14–15).

may, as the opinion below indicates, be determined on other grounds. The circuit court of appeals found that it was "in the highest degree unlikely" that the jury based its verdict on the conspiracy count on any of the overt acts alleged to have occurred beyond the period of limitations, but felt impelled to discuss the question "against that purely theoretical chance" (p. 2263). We submit that the likelihood of any such "purely theoretical chance" is so remote as to be nonexistent. The first four overt acts charged were meetings between Mussman, Cohen and Wachtel before March 1935, whereas Mussman testified that he first met Cohen in April of 1935 (see R. 3029–3030). The jury convicted petitioners Raffe, Cohen and Wachtel on substantive counts all of which were based on letters written within the period of limitations, showing clearly that the jury found that they were part of the conspiracy during the period within the statute of limitations. Petitioners Rogoff and Rosenberg did not come into the conspiracy until after September 1935. The United States Attorney, in his summation to the jury, referred only to the overt acts which were supported by documentary evidence, all of which were within the period of limitations (R. 15263–15264).

Moreover, the trial court, although it failed to withdraw the overt acts beyond the statute from the jury's consideration, did instruct the jury fully

that, if a defendant withdrew from the conspiracy, he was no longer responsible for the acts of his co-conspirators and that, if he had withdrawn more than three years prior to September 30, 1938, the date of the indictment, he could not be convicted because of the bar of time (R. 15666–15667). In view of all these circumstances it is inconceivable that the jury could have based its verdict on the conspiracy count on the five overt acts which were beyond the period of limitations. Assuming that it was error not to withdraw the overt acts from the jury's consideration such error was, under the narrowest possible construction of the harmless error doctrine, non-prejudicial error.[11]

3. The other contentions made by petitioners individually present no questions of merit.

a. Petitioner Cohen contends (Pet. 42–43) that the court erred in stating that, in reviewing the evidence, it was not required to apply the test of reasonable doubt. Its statement to such effect is in accord with the decisions of this Court which have defined the function of appellate review as "only to ascertain whether there was some competent and substantial evidence before the jury fairly

[11] In stating that as to other errors alleged, and not discussed, "even were they errors, we should not because of them reverse convictions so just upon the merits" (p. 2265), the circuit court of appeals was not, as petitioner Cohen contends (Pet. 47–52) adopting an unduly broad construction of the harmless error doctrine, for it is evident that the court in its opinion discussed all questions of substance.

tending to sustain the verdict." *United States* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150, 254; *Burton* v. *United States*, 202 U. S. 344, 373. In any event, the opinion, as a whole, makes abundantly clear that by any test of the sufficiency of the evidence, the circuit court of appeals was of the opinion that the convictions were "just upon the merits" (p. 2265).

b. Petitioner Raffe complains (Pet. 23–26) that his activities were outside the jurisdiction of the court and beyond the period of limitations. However, as we have shown (*supra*, pp. 22–23, 27–28), the judge fully and correctly instructed the jury on both these points and the evidence supports the finding that Raffe and his Boston associates were cooperating with the New York group in one general conspiracy. The counts on which Raffe was convicted involved the mailing of a letter from New York within the period of limitations and there was other evidence to show that he had not disassociated himself from the conspiracy more than three years before the return date of the indictment but that within such period he was cooperating with various defendants in completing frauds started earlier or in pacifying victims previously defrauded (e. g. R. 839–840, settlement with Miss Williston; Gov. Ex. 817A, R. 4804–4805, lulling letters to Mrs. Klimm).

c. Both petitioners Cohen (Pet. 60–62) and Raffe (Pet. 14–15) attack the sufficiency of the

evidence to establish the mailing within the jurisdiction of the district court of the letters on which counts 1 and 2 respectively are based. The circuit court of appeals stated in respect of this contention (p. 2254):

> We have examined the disputed passages [evidence] in all cases, and we are satisfied that this contention is without basis though it would indirectly extend this opinion to discuss each case in detail. We, of course, agree that in the case of all the first 29 counts the crime of Section 338 was the mailing of the letter and that this must therefore be in the district where the indictment is found; but no more persuasive evidence is required upon this than upon any other issue in the case.

The question is wholly one of the sufficiency of the evidence and does not present an issue for further review by this Court. *United States* v. *Johnston,* 319 U. S. 503, 518; *Delaney* v. *United States,* 263 U. S. 586, 589–890.

d. Petitioners Raffe (Pet. 32–34) and Cohen (Pet. 33–34, n. 14) also complain of the failure of the trial judge to curb the Government witness Mussman. Most of Mussman's conduct which forms the basis of these complaints consisted of answers given on cross-examination. It is difficult to see why petitioners should claim prejudice because of the fact that Mussman revealed a hostility toward his confederates which they them-

selves endeavored to bring before the jury. The trial judge in a conference between the attorneys stated that in his opinion each person had a particular "genius of his own" which revealed itself on the witness stand (R. 584–585). The judge was obviously patient, but he did make a number of attempts to curb Mussman's outbreaks (e. g. R. 1852, 1784, 3122, 3123, 3321, 3511–3512, 3848, 4169, 4179). The manner of dealing with the witness was clearly one within the trial judge's discretion as to the conduct of the trial, and a reading of the record of Mussman's testimony as a whole makes it clear that the trial judge did not abuse his discretion or deprive petitioners of a fair trial.

e. Petitioner Cohen contends (Pet. 53–54) that it was prejudicial error as to him to allow the prosecutor to read to the jury the opinion of the Circuit Court of Appeals for the Tenth Circuit in the case of *Rosenberg* v. *United States,* 120 F. (2d) 935. Rosenberg had testified on redirect examination that although he had been convicted in another mail fraud case, the indictment had been dismissed on appeal (R. 14689–14690). On re-cross-examination the prosecutor then read the opinion to show that the decision turned solely on the lack of proof of mailing (R. 14693–14694). There is nothing in the reported opinion, which merely gave the facts of the transaction there involved, which could have been prejudicial to

the other defendants and the judge instructed the jury to disregard any facts not directly relevant to the case at bar (R. 14694). The only effect which the opinion could have had was to emphasize a point favorable to the defendants, that the evidence must establish not only a scheme to defraud, but a mailing in execution of the scheme.

f. Petitioner Cohen also complains (Pet. 54–57) of the prosecutor's questions as to whether he knew that some of his associates had been convicted of crimes involving deceits (R. 13419, 13424–13425, 13427–13430). Cohen denied such knowledge, except as to two persons, and as to those he was allowed to explain the circumstances under which he employed them (R. 13420–13421, 13429). On redirect examination Cohen testified fully about the circumstances which led him to employ the various salesmen (R. 13656–13664). It was, as the court below held, "competent and relevant to prove that Cohen had employed as subordinates, or been associated with those whom he knew to have been convicted of crimes" (p. 2259). The judge allowed the prosecutor to specify the nature of the crime on the ground that, if the questions were asked without particularization, the crime might appear to be more heinous than it was (R. 13425–13426). That the prosecutor was justified in not resting on a blanket denial is shown by the fact that after making such denial (R. 13419) Cohen did admit to knowledge of two convictions (R. 13420, 13429).

g. Petitioner Cohen contends (Pet. 57–59) that he was denied his constitutional right to be present at all stages of the trial by reason of the fact that the trial judge privately examined statements previously made by Mussman to the United States Attorney and then held that "there are reasons of public policy for these remaining exhibits to be confidential" (R. 4479).

The United States Attorney had made available to defense attorneys all papers turned over by Mussman (R. 3735–3742) but stated that there was some material not relevant to the defendants on trial which had been withheld (R. 4175). The court requested the United States Attorney to submit the additional papers to him (R. 4175–4177) and the United States Attorney stated that he would explain in private his reasons for not showing them to the court (R. 4176). Subsequently the court made its ruling that there was no foundation laid for the request by the defendants (R. 4478), and that, in any event, its examination of the exhibits convinced it that there were reasons of public policy for keeping them confidential (R. 4479). Photostats of the exhibits were sealed and sent up to the circuit court of appeals, which stated "We too have examined them, and they had no impeaching value whatever" (R. 2260). It does not appear from the record whether there was a private conference between the judge and the United States Attorney, since the judge in his ruling referred only to his

examination of the exhibits. Even assuming that such conference took place, it does not, we submit, constitute a denial of petitioners' constitutional rights. It is questionable whether petitioners were entitled to as much consideration as they received in this regard. The court below in *United States* v. *Krulewitch*, 145 F. (2d) 76, went further than any prior federal case in holding that a defendant ought to be allowed to examine a statement previously given by a witness to investigating officials but even that decision is limited to a situation where it is definitely indicated by testimony at the trial that the statement would have an impeaching effect. No such situation exists here. Even in a case where it appears that the statement might have impeaching value, the question whether permission to disclose it would be consistent with public policy is plainly one peculiarly within the province of the trial judge (cf. *United States* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150, 233–234). Certainly in the determination of such a question the judge is entitled to obtain from the United States Attorney the relevant information to be considered. Manifestly, to disclose that information at the trial in the presence of others, including the defense attorneys, would be to defeat the relevant public purpose.

h. Petitioner Rosenberg (Pet. 24–26) objects to the court's denial of his motion to inspect the minutes of the grand jury in respect of the testi-

mony of Ellen McDonald, a victim who had died before the trial. The granting of a motion for inspection of the grand jury minutes is a matter within the discretion of the court. Cf. *United States* v. *Socony-Vacuum Oil Company,* 310 U. S. 150, 233–234. Here Ellen McDonald's testimony could not have been offered in evidence either by the Government or by Rosenberg. Rosenberg could and did testify himself as to his transactions with her. Manifestly, therefore, there was no abuse of discretion in denying the motion.

CONCLUSION

For the foregoing reasons we respectfully submit that the petitions for writs of certiorari should be denied.

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JANUARY 1945.

U. S. GOVERNMENT PRINTING OFFICE: 1945